IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	¦	
	¦	
V.	¦	CR. NO. 90-252-S
	¦	
BENNIE DEAN HERRING	¦	

ORDER

A federal grand jury has indicted defendant Bennie Dean Herring on two counts of assisting in the unauthorized decryption of satellite cable programming in violation of 47 U.S.C.A. Sec.605(e)(4).(1) The indictment specifically charges that Herring illegally modified and distributed devices designed to "descramble" satellite television signals transmitted from cable programmers to subscribers. Herring has moved to dismiss the indictment on a variety of grounds. For the reasons that follow, the court concludes that his motion is due to be denied.

I. Selective Prosecution

Herring contends that the government has singled him out for prosecution while failing to prosecute other persons who, the

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1. This portion of the statute provides, in relevant part, that,

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic or mechanical, or other deivice or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming ... shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both.

Sec. 605(e)(4)

government is aware, possess and use the same kinds of "descrambler" devices as

Herring. He requests an evidentiary hearing in order to present proof in support of this claim of selective prosecution, a criminal defendant must establish, among other thing, that the decision to prosecute was based on an invidious classification such as race or religion. Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531 (1985); United States v. Gordon, 817 F.2d 1538, 1539 (11th Cir. 1987) (per curiam), vacated in part on other grounds, 836 F.2d 1312 (11th Cir. 1988). Even if Herring is correct in arguing that the government had "no rational basis" to prosecute him and not others similarly situated, he has failed to show that he was singled for any invidious or otherwise impermissible reason. Therefore, his selective prosecution claim lacks merit.

II. Lack of a "Marketing System"

Herring also claims that the indictment should be dismissed because Sec. 605, by its

own terms, cannot be enforced unless and until a "marketing system" is established under which "an agent...has been lawfully designated for the purpose of authorizing private viewing by individuals." Sec. 605(b)(2). However, among other flaws in this arguement, Herring ignores the fact that the marketing system excetion of Sec. 605 (b)(2) applies only if, in addition, "the programming involved is not encrypted." 47 U.S.C.A. Sec. 605(b)(1). Herring does not--nor could he logically--contend that the decrpytion

devices he is charged with modifying and distributing were intended to receive unencrypted programming. In any event, the government contends that a markeing system has been established.

III. No Legal Evidence in Support of Indictment

Herring has also moved to dismiss the indictment on the ground that there was no legal evidence before the grand jury that he had violated Sec. 605(e)(4). However, an indictment valid on its face may not be challenged on the basis of inadequate ividence. United states v. Calandra, 414 U.S. 338, 345, 94 S.Ct. 613, 618 (1974); United States v. Hyder, 732 F2d 841, 845 (11th Cir. 1984). See also Midland Asphalt Corp. v. United States, ___ U.S. ___, 109 S.Ct. 1494, 1499-1500 (1989) ("only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried").

IV. Indictment's Lack of Specificity

Herring claims that the indictment does

not contain a plain, concise statement of the facts constituting the crimes he is charged with committing.(2) The indictment in this case sets out the approximate dates and places of the offenses, specifies / describes the "descrambler" devices that Herring used and shat he did with them, and contains all the elements of a violation of Sec.

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2. Herring has not requested a bill of particulars.

605(e)(4).(3) The indictment is sufficient to inform Herring of the charge against which he must defend, under both the sixth amendment to the United States Constitution, see United States v. Ramos, 666 F.2d 469, 474 (11th Cir. 1982), and Fed. R. Crim. P. 7(c)(1).

V. Right to Privacy

Herring suggests that Sec. 605(e)(4) is unconstitutional both on its face and as applied to him in this criminal prosecution because it violates his right to monitor satellite signals that travel throught the public airwaves.(4) Herring relies on the Eight circuit's decision in Tyler v. Berodt, 877 F2d 705 (8th Cir. 1989), cert. denied, ____ U.S. ___, 110 S.Ct. 723 (1990), holding that private citizens do not have a "justifiable expectation of privacy" in their cordless telephone conversations, sufficient to bring a civil action under 47 U.S.C.A. Sec. 605. Tyler says nothing about whether the government may proscribe the unauthorized decrytpion

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3. Count I charges:

On or about the 11th day of May, 1990, in the Middle District of Alabama,

BENNIE DEAN HERRING did manufacture, assemble, modify, sell, and distribute an electronic, mechanical and other device, that is a General Instruments Videocipher descrambler, serial number P10500654 containing a modified circuit board with serial number A/O A032A7C2D, knowing, and having reason to know that the device is primarily of assistance in the unauthorized decryption of satellite cable programming, in violation of Title, 47, United States Code, Section 605(e)(4).

Count II refers to a "descrambler" with a different serial number which Herring allegedly used on a different date; otherwise, its language is identical to that of Count I.

Herring describes this right as a component of the constitutional right to privacy.

of satellite cable programming. Herring's proposition that his conduct is protected by a right to monitor the airwaves or any other kind of privacy right finds no support in Tyler or elsewhere.(5)

VI. Outrageous Government Conduct

According to Herring, the indictment in his case should be dismissed because the government has engaged in outrageous conduct by prosecuting him at the urging of, and in order to benefit, an illegal monopoly of satellite cable companies. Herring has presented no evidence of any connection between the government's prosecution of this case and any illegal acts on the part of cable companies; even if he had, this would not be sufficient to demonstrate government conduct so outrageous that it violates his right to due process. See Hampton v. United

States, 425 U.S. 484, 489-90, 96 S.Ct. 1646, 1649-50 (1976); United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643 (1974). Cf. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952).

VII. Sec. 605(e)(4) as Void for Vagueness

Finally, Herring asserts that the law shich he is charged with violating, Sec. 605(e)(4), is unconstitutional on its face because it is "indefinite" and "vague". However, there is no indication that

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5. See also ON/TV of Chicago v. Julien, 763 F.2d 839, 843 (7th Cir. 1985) ("Sales of devices solely designed to intercept protected communications threaten the viability of the subscription television industry and there is no countervailing social or policy consideration that would justify these sales").

the statute sweeps within its reach any constitutionally protected conduct or that it draws an imprecise or uncertain line between permitted and illegal activity.(6) Section 605(e)(4) defines the offense Herring is accused of committing "with sufficient definite-ness that ordinary people can understand what conduct is prohibited," and "in what manner that does not encourage arbitrary and discriminatory enforcement." Kolendar v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983).

VIII. Conclusion

Accordingly, it is the ORDER, JUDGMENT, AND DECREE of the court, that the motion to dismiss the indictment, filed by defendant Bennie Dean Herring on October 26, 1990, be and it is hereby denied.

DONE, this the 14th day of November, 1990.

Myron Thompson

United States District Judge

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6. The court also notes that the statute's applicability is limited by its knowledge requirement. See 47 U.S.C.A. Sec. 605(e)(4).

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	
vs.		CR. NO. 90-252-S
	:	
BENNIE DEAN HERRING		

ORDER

This cause is now before the court on defendant Bennie Dean Herring's motion for bond and release pending appeal. For the following reasons, this motion is due to be granted.

The Bail Reform Act of 1984, 18 U.S.C.A. Section 3143, the court presumes that detention is valid despite the pending appeal, and the defendant bears the burden of overcoming that presumption and proving

that release is appropriate. Morison v. United States, 486 U.S. 1306, 108 S.Ct. 1837 (Rehnquist, Circuit Justice 1988) (release pending certiorari petition); United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam), cert. denied, 479 U.S. 1018, 107 S.Ct. 669 (1986) (release pending appeal). In order to grant a defendant's motion for release pending appeal, the district court must make the following findings:

(1) that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released;

(2) that the appeal is not for purpose of delay;

(3) that the appeal raises a substantial question of law or fact; and

(4) that if that substantial question

> is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

Giancola, 754 F.2d at 901.* The burden of proving these findings lies with the defendant. Id.

The court heard oral argument on Herring's motion at a hearing held on May 1, 1991. Upon consideration of the record in this case, the court finds that Herring is neither likely to flee pending appeal, nor does he pose any danger to the safety of any other person or the community if released. The court also finds that Herring's appeal is not for the purpose of delay.

As to the third factor, the Eleventh Circuit has defined a substantial question for purposes of section 3143 in the following manner.

> [A] "substantial question" is one of more substance than would be necessary to a finding that it was not frivolous. It is a "close" question or one that very well could be decided the other way. Further, there are no blanket categories for what questions do or do not constitute "substantial" ones. Whether a question is "substantial" must be determined on a case-by-case basis.

Id. See generally United States v. Hicks, 611 F. Supp. 497, 499 & nn. 2,3 (S.D. Fla. 1985) (discussing the Giancola standard).

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* In the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, section 7091, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 4181, 4410 (Stat. Supp. Feb. 1989), Congress amended section 3143 to apply as well to substantial questions on appeal likely to

result in no imprisonment or in a reduction of the defendant's sentence below the amount of time already served in custody.

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At this time, Herring challenges his conviction under 47 U.S.C.A. section 605(e)(4). Section 605(e)(4) is a new law, and, as a result, Herring's conviction presents a number of substantial questions of first impression. Indeed, in resolving pretrial and trial matters, the court found little or no case law for guidance. The court is, therefore, of the opinion that this case presents substantial and novel questions of law that, if resolved in Herring's favor, may be likely to result in a reversal of his conviction or an order of a new trial. Under these specific circumstances, and in light of the court's findings, release pending appeal is justified.

Accordingly, it is ORDERED that

defendant Bennie Dean Herring's motion for release pending appeal, filed on April 24, 1991, be and it is hereby granted.

It is further ORDERED the defendant Herring's release is under the same bond and conditions imposed by the United States Magistrate on October 12, 1990, as amended by this court on February 6, 1991.

Myron Thompson

United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7377

D.C. Docket No. CR90-252

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENNIE DEAN HERRING,

Defendant-Appellant.

Appeal from the United States

District Court

for the Middle District of Alabama

(June 2, 1993)

Before ANDERSON, Circuit Judge, MORGAN and JOHNSON*, Senior Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Judgement Entered: June 2, 1993

For the Court: Miguel J. Cortez,Clerk

By: Kathleen McNabe

Deputy Clerk

ISSUED AS MANDATE: Aug. 9, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7377

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENNIE DEAN HERRING,

Defendant-Appellant.

On Appeal from the United States

District Court for the

Middle District of Alabama

ON PETITION(S) FOR REHEARING AND

SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON, Circuit Judge, MORGAN and JOHNSON*, Senior Circuit Judges.

PER CURIAM:

(X) The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The petition(s) for Rehearing are Denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THIS COURT

Judge L. Anderson

UNITED STATES CIRCUIT JUDGE

ORD-42

(9/91)